No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,

Petitioner,

v.

MICHAEL H. RESH, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual lawsuits. Public Citizen has a longstanding interest in preserving the viability of these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has participated as amicus curiae, and its attorneys have served as counsel to parties or amici curiae, in many cases in this Court and other federal courts involving class action procedures, including: *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Of particular relevance here, Public Citizen's counsel represented the petitioner in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparing or submitting it. The parties participating in this Court have filed blanket consents to filing of amicus briefs.

(2010), in which the Court held that plaintiffs who satisfy the terms of Federal Rule of Civil Procedure 23 are entitled to pursue their claims through a class action. Public Citizen submits this brief to explain how *Shady Grove* and the principles that underlie it compel the conclusion that plaintiffs who possess live claims by virtue of the tolling effect of a prior class action may pursue those claims as a class if they are able to demonstrate that the class satisfies Rule 23's requirements for class certification.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this action was filed, all members of the proposed class undisputedly possessed live securities fraud claims against petitioner China Agritech because the running of the statute of limitations on those claims had been suspended during the pendency of a previous class action under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under this Court's holding in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the class members were not bound by any prior ruling that their claims could not be brought as a class action. And no considerations of comity suggested that certification of the class was unwarranted, because no court had ever considered whether the showing they proposed to make was sufficient under Rule 23 to justify class certification.

Nonetheless, China Agritech argues that members of the class, plaintiffs here, could pursue their claims only individually, whether by filing separate actions, joining their individual claims under Rule 20, or intervening under Rule 24 in an action brought by other individual class members. Of the procedural mechanisms potentially available under the Federal Rules of Civil

Procedure for asserting such claims, China Agritech asserts, only the class action procedures of Rule 23 are unavailable to these plaintiffs, regardless of whether they would otherwise satisfy the Rule's requirements.

China Agritech's submission is fundamentally at odds with the terms of Rule 23, the nature of the aggregate litigation the Rule permits, and basic principles governing the effect of procedural rules promulgated under the Rules Enabling Act. As this Court held in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the terms of Rule 23 entitle plaintiffs to bring their claims as a class action in federal court if they satisfy the Rule's criteria for certification of a class. Moreover, the remedy any one plaintiff is entitled to receive on an otherwise viable claim cannot depend on whether the claim is pursued in an individual action or a class action: A class action is a procedural device for aggregating claims that plaintiffs possess individually and can neither expand nor limit their entitlement to relief. Indeed, holding that whether a plaintiff has a claim for relief depends on whether relief is sought under Rule 23, in an individual action, or in another form of aggregate litigation permitted under the Federal Rules of Civil Procedure would be incompatible with the Rules Enabling Act's command that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Moreover, the proposition that plaintiffs may not rely on *American Pipe* tolling in a subsequent class action threatens to reintroduce through the back door the proposition the Court rejected in *Smith v. Bayer*—namely, that plaintiffs are precluded from pursuing claims as a class by previous decisions rejecting class

certification in cases in which they were not named plaintiffs. *Smith* held that foreclosing plaintiffs from seeking class certification because another plaintiff's effort to represent a class had failed would be contrary to fundamental principles governing the preclusive effects of judgments. Here, China Agritech seeks essentially the same result through another means—one that is equally incompatible with fundamental jurisprudential principles.

ARGUMENT

I. All members of the plaintiff class had live claims when this action was filed.

Under this Court's holdings in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), which China Agritech does not question, each member of the proposed class in this case had a live claim when this action was filed. Accordingly, under the terms of both Rule 23 and the fundamental principle that a class action under the federal rules does not—and cannot—change the substantive entitlements of class members, the class members may pursue their claims in a class action if the requirements of Rule 23 are met.

American Pipe establishes two propositions central to this case: that "the filing of a timely class action commences the action for all members of the class as subsequently determined," 414 U.S. at 550, and that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *id.* at 554. Although *American Pipe* considered only whether the tolling effect of a proposed but ultimately uncertified class action rendered subsequent motions by class members to intervene in that action timely, *see*

id. at 553, the Court soon recognized that its reasoning could not be confined to such cases. In *Eisen v. Carlisle & Jacquelin*, decided the same Term as *American Pipe*, the Court recognized that plaintiffs who might opt out of a certified class after the time the statute of limitations otherwise would expire had timely claims because *American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." 417 U.S. 156, 176 n.13 (1974).

Crown, Cork confirmed that the holding of *American Pipe* "is not to be read so narrowly" as to apply only to the particular procedural circumstances it addressed. 462 U.S. at 350. Rather, *Crown, Cork* held, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class.'" *Id.* (quoting *American Pipe*, 414 U.S. at 554); *see also id.* at 353–54. Moreover, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 354.

In *Chardon v. Fumero Soto*, the Court again confirmed that a federal class action "toll[s] the statute of limitations until class certification is denied." 462 U.S. 650, 661 (1983). That is, "the statute of limitations ceases to run," *id.* at 652 n.1, during the period in which the action is pending as a class action or potential class action.[2]

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[2] *Crown, Cork* and *Chardon* both concerned plaintiffs who filed individual actions after the failure of certification of the class actions they relied on for tolling. The occasional references of the Court in both cases to "individual actions" refer to the procedural posture of the cases; they do not purport to impose a limit on the

(*Footnote continued*)

The necessary consequence of these holdings is that, once tolling ceases, each class member who possessed a live claim at the time the class action was filed continues to have a live claim until whatever time remains under the statute expires. The claims of each class member may be asserted until that time runs out. *See id.* at 661.[3]

II. Rule 23 entitles plaintiffs with viable claims to bring them in a class action if they meet the Rule's standards for class certification.

The filing of a class-action complaint within the time remaining under the applicable limitations period, no less than the filing of an individual action or

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type of action a beneficiary of *American Pipe* tolling may later bring. Notably, in stating the rule they applied, both *Crown, Cork* and *Chardon* said that a plaintiff whose claim is timely because of the tolling effect of a class action that is ultimately not certified may either intervene in that action or bring a "separate" action, *Crown, Cork*, 462 U.S. at 352; *Chardon*, 462 at 661 n.14—*i.e.*, an action separate from the original class action. Neither decision suggests that the separate action could not be a *class* action.

[3] In this case and most other instances involving federal claims with federally defined limitations periods, the time remaining will consist of the statutory limitations period less whatever time ran on it before it was suspended by the filing of a class action. *See Crown, Cork*, 462 U.S. at 354; *American Pipe*, 414 U.S. at 561; *cf. Artis v. Dist. of Columbia*, 138 S. Ct. 594, 601 (2018) (describing the ordinary effect of tolling or suspending a limitations period as "that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off"). In some cases, however, when a federal statute borrows state limitations law, the amount of time remaining may be determined differently. *See Chardon*, 462 at 661–62. In either event, each class member's claim remains timely for the full remaining time established by the applicable law.

an attempt to intervene in an existing suit, satisfies the statute of limitations for class members who have live claims by virtue of the tolling effect of a previous action. This consequence follows from *American Pipe*'s holding that "the filing of a timely class action commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That the reason class members have live claims is the tolling effect of a prior action does not alter the conclusion that the statute of limitations is satisfied by commencement of an action properly asserting those claims within the time remaining in a limitations period. Indeed, in *American Pipe* itself, the class action whose filing tolled the limitations period for the claims of class members was itself timely only because of the tolling effect of an action previously filed by the United States asserting the same claims. *See American Pipe*, 414 U.S. at 541–42 (citing 15 U.S.C. § 15b).

China Agritech argues that a class action, alone among the procedural mechanisms for asserting a claim in federal court, is an impermissible vehicle for bringing claims that are live because of the tolling effect of a prior class action. That argument is irreconcilable with this Court's construction of Rule 23 in *Shady Grove* and with the basic principles on which that decision rests.

Shady Grove addressed whether, in an action filed in federal court, Rule 23 allowed a plaintiff to assert certain state-law claims in a class action when, under state law, the same claims (for statutory penalties) could not be the subject of a class action in a state court. Before addressing the consequences of possible conflict between state and federal law under *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Erie Railroad Co. v.*

Tompkins, 304 U.S. 64 (1938), the Court first had to determine whether a conflict existed. That question depended on whether Rule 23's terms entitled the plaintiff to proceed with a class action in federal court if the case satisfied the Rule's criteria for certification of a class.

On the latter question, *Shady Grove* held, Rule 23 spoke unequivocally:

> [Rule 23] states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.

559 U.S. at 398.

"[W]hat Rule 23 does," in other words, is "empower[] a federal court 'to certify a class in each and every case' where the Rule's criteria are met." *Id.* at 399. Because the Rule provides that "if the prescribed conditions are satisfied, '[a] class action *may be maintained*,'" *id.* at 399–400 (quoting Rule 23; emphasis by the Court), it follows that if a plaintiff has a claim, and it meets the Rule's requirements, "[h]e may bring his claim in a class action if he wishes." *Id.* at 400. And because "Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts,'" *id.* (emphasis original, citation omitted), it follows that "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a

class action if the Rule's prerequisites are met." *Id.* at 406 (emphasis original).[4]

The dissent in *Shady Grove*, while disagreeing with the majority on how to reconcile the commands of state and federal law at issue in the case, agreed on the point most relevant here: that "Rule 23 describes a method of enforcing a claim for relief," and "authorizes class treatment for suits satisfying its prerequisites." *Id.* at 447 (Ginsburg, J., dissenting). The dissent saw no conflict between this authorization and the New York law at issue because it viewed the latter as a *substantive* limit on the claims of members of the class rather than as a prohibition on the use of Rule 23 to pursue claims available as a matter of substantive law through the class mechanism. *Id.* at 447–48. In a case, like this one, where the claims rest on federal law, the dissenting view of Rule 23 leads to the same result as the majority's: Unless Congress has provided otherwise, *see id.* at 400 (majority); *id.* at 450 (dissent), plaintiffs who have actionable claims may pursue them in a class action if they satisfy the requirements of the Rule, *see id.* at 398 (majority); *id.* at 447 (dissent).

Thus, for purposes of this case, the critical teaching of *Shady Grove*, reflected in both the majority and dissenting opinions, is that if a class of plaintiffs possess a common claim and if they otherwise meet the requirements of Rules 23(a) and (b)—a point not at issue at

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[4] The cited passages from *Shady Grove* reflect the holding of a five-Justice majority. In explaining why federal law as reflected in Rule 23 prevailed over the state rule (an issue not pertinent here), the lead opinion commanded only four votes, with Justice Stevens concurring on that point in an opinion offering a somewhat different analysis. *See id.* at 416 (Stevens, J., concurring in part and concurring in the judgment).

this stage in this action—they are *entitled* to assert their claims in a class action. *Id.* at 398 (majority). Here, the limitations period for the claims of each member of the class was tolled during the pendency of a previous class action. Once that tolling ceased, each member had a live claim for the duration of the time remaining under the statute of limitations, which had not expired when this action was commenced. Because a timely claim could be stated on behalf of each member of the class, it would violate Rule 23 as construed in *Shady Grove* to prohibit the assertion of those claims on behalf of a class.

China Agritech insists that *Shady Grove* is inapplicable because it "did not mention tolling," Pet. Br. 15, and "had nothing to do with equitable tolling," Pet. Br. 51. Of course, *Shady Grove* itself was not a case about tolling, but it was about Rule 23. And *Shady Grove*'s holding that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," 559 U.S. at 398, dictates the outcome here. China Agritech's position that plaintiffs with live claims may pursue them through any otherwise applicable procedure *except for* a Rule 23 class action contradicts that categorical rule.

China Agritech nonetheless asserts that "*Shady Grove* simply does not require or even authorize courts to toll statutory time bars in [these] circumstances." Pet. Br. 52. But the question is not whether *Shady Grove* authorizes *tolling*. Under this Court's holdings in *American Pipe* and *Crown, Cork*, the running of the statute of limitations was already tolled for all class members during the pendency of the earlier class action. As *Crown, Cork* held, it is "[t]he filing of a class action" that "tolls the statute of limitations 'as to all

asserted members of the class.'" 462 U.S. at 350 (quoting *American Pipe*, 414 U.S. at 554). Moreover, tolling lasted "for all members of the putative class until class certification [was] denied." *Id.* at 354. Tolling then ceased, and the statute of limitations began to run. And the parties agree on that point.

Thus, the question now is not whether to give some *additional* tolling effect to a prior class action: tolling began and ended with the earlier class actions. The question now is only whether the claims the class members concededly retained by virtue of the now-completed period of tolling were properly asserted by filing a class action within the time remaining. *Shady Grove*'s holding that cognizable claims may be brought and maintained in a class action if the terms of Rule 23 are satisfied supplies the answer to that question: Because it was proper to assert the claims of the class members under Rule 23, the filing of a class action within the limitations period commenced a timely action for all of them. *See American Pipe*, 414 U.S. at 550.

III. This Court's holding in *Shady Grove* rests on basic principles of aggregate litigation and the Rules Enabling Act.

China Agritech's position that a plaintiff with a live claim can pursue it in an individual action, or through intervention or joinder, but not through a class action is not only at odds with *Shady Grove* and the terms of Rule 23, but also with fundamental principles of aggregate litigation and the Rules Enabling Act. China Agritech's position boils down to the assertion that an individual's entitlement to relief is different inside and outside of a class action. That is, under China Agritech's view, a plaintiff in an individual action would have a timely claim, but the same plaintiff may

not assert the same timely claim as part of a class action.

That proposition contravenes "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting). A Rule 23 class action is a vehicle that, where the Rule's criteria are satisfied, allows aggregate pursuit of the claims of a class encompassing anyone who could "bring a freestanding suit asserting his individual claim." *Shady Grove*, 559 U.S. at 408 (plurality). Class actions "leave[] the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* They "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed." *Id.*[5] Thus, a plaintiff's right to recovery cannot depend on whether the plaintiff asserts it in a class action or an individual action. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016).

The principle, recognized by this Court, that the substantive rights of individual plaintiffs are the same whether asserted in a class action or an individual action flows directly from the Rules Enabling Act's prohibition on the promulgation of procedural rules that alter substantive rights. "In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,'

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[5] Although the quoted language above is from the plurality portion of *Shady Grove*, the point was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010).

§ 2072(b)." *Shady Grove*, 559 U.S. at 406–07 (plurality). As the Court observed in *Wal-Mart Stores, Inc. v. Dukes*, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 564 U.S. 338, 367 (2011).

Inclusion in a class action thus neither confers substantive rights on a plaintiff nor takes them away. If a plaintiff could pursue a claim individually but not in a properly certified class, Rule 23 would "*abridge* ... [a] substantive right" in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b) (emphasis added). Accordingly, in *Tyson Foods*, the Court held that a judicial ruling that would limit a plaintiff's substantive right to prove her case "merely because the claim is brought on behalf of a class" would "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right.'" 136 S. Ct. at 1046.[6] *See also Shady Grove*, 559 U.S. at 408 (plurality opinion); *id.* at 422 (Stevens, J., concurring); *id.* at 438 (Ginsburg, J., dissenting).

Simply put, it would "violate[] the Rules Enabling Act [to] giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048. China Agritech's position would do just that.

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[6] The dissent in *Tyson Foods* agreed with the majority that the substantive claims of individual class members should not differ depending on whether they are asserted in a class or individual action. *See id.* at 1057 (Thomas, J., dissenting) (citing 136 S. Ct. at 1046–47 (majority)).

IV. The argument against tolling attempts to resurrect the preclusion arguments rejected by this Court in *Smith v. Bayer*.

Much of China Agritech's argument rests on the notion that the Court should abandon the principle that plaintiffs with viable claims may pursue them in either an individual or class action because application of that principle here would lead to "relitigation" of previous decisions denying class certification. *E.g.*, Pet. Br. 22–23. Relitigation, however, is a concern addressed by preclusion doctrines that determine when parties are bound by former adjudications. And this Court has already held, without dissent, that the denial of certification in a prior case does not preclude individuals other than the named plaintiff from seeking class certification in a subsequent case. *Smith v. Bayer*, 564 U.S. at 312–18.

Smith v. Bayer holds unequivocally that, under "longstanding principles of preclusion," *id.* at 318, when certification is *denied* in a case, absent class members are not bound by the adjudication of the certification issue. Rather, class members other than the named plaintiff can be bound by adjudication of an issue in a class action only if the action is certified, because the very point of certification is to determine whether it is fair to bind absent parties to an adjudication. *Id.* at 314–15. When a court holds that an action may not be maintained as a class action, the essential "precondition" for binding an absent class member to *any* adjudication in the action—including the adjudication of the certification issue itself—is absent. *Id.* at 315. Thus, "[n]either a proposed class action nor a rejected class action may bind nonparties." *Id.*

China Agritech's argument attempts an end-run around *Smith v. Bayer* by applying another label (tolling) to what it acknowledges is actually preclusion of "relitigation" of certification decisions. As explained above, however, this approach violates fundamental class-action principles—in particular, the principle that plaintiffs have the same substantive rights whether their claims are pursued on an individual or class basis—just as much as the preclusion-based approach rejected in *Smith v. Bayer*. Similarly, the policy argument China Agritech invokes to cover the legal deficiencies of its position is the same one rejected in *Smith v. Bayer*: namely, that the consequence of applying normal class action doctrines would allow "class counsel [to] repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint.'" *Id.* at 316. That policy argument is no more a reason to distort the *Shady Grove* principle that a plaintiff with a valid individual claim can assert it on behalf of a class that satisfies Rule 23 than it was for turning standard preclusion principles upside down in *Smith v. Bayer*.

That the argument against reliance on *American Pipe* tolling in a successive class action is in essence a recycling of the preclusion approach rejected in *Smith v. Bayer* is demonstrated by the fact that nearly all of the lower-court decisions rejecting tolling in successive class actions before *Smith* rested either explicitly or implicitly on preclusion principles. As Judge Easterbrook explained in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), those decisions were based on what was then thought to be "the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Id.* at 563. They reflected the view "that a decision declining to certify

a class in the first suit binds all class members, who cannot try to evade that decision by asking for a second opinion from a different judge." *Id.* at 563–64. In other words, their premise was that "[c]lass members must abide by the first court's understanding and application of Rule 23." *Id.* at 564. And because the decisions were fundamentally about preclusion, they permitted successive class actions where the reasons for the prior denial of certification were not "applicable" to the later suit, *id.*—an approach similar to China Agritech's fallback argument, *see* Pet. Br. 54–59.[7]

As China Agritech itself acknowledges, *Smith v. Bayer* pulled the rug out from under such explicitly or implicitly preclusion-based approaches. *See* Pet. Br. 47–48. What China Agritech fails to realize, however, is that manipulating the *American Pipe* rule to resurrect a bar on successive class actions when "the propriety of class treatment has been previously adjudicated," Pet. Br. 54, equally fails to square with *Smith*'s holding that principles of "former adjudication" do not permit that result. 564 U.S. at 302.

In sum, the holding of *Smith v. Bayer* combines with that of *Shady Grove*, and the principles underlying it, to compel rejection of China Agritech's view that a class action brought by plaintiffs whose claims were tolled by a prior, ultimately uncertified class action is impermissible. If an individual named plaintiff has timely claims, *Shady Grove* permits her to pursue them in a class action together with other plaintiffs with like claims, if Rule 23's criteria are satisfied. And *Smith v.*

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[7] Because no court has ever ruled on whether the proposed showing of the plaintiffs in this action would support certification, China Agritech's fallback argument would be unavailing here, *see* Resp. Br. 50–51, even if it were legally sustainable.

Bayer forecloses the possibility that the named plaintiff's attempt to satisfy Rule 23's certification criteria can be precluded by the outcome of a prior case in which another plaintiff did not succeed in obtaining certification of a class.

In this case, the proposed class consists of members who had live claims when the action was brought. None of those class members was bound by any decision holding that the proposed class action could not proceed. Indeed, no court has ever reached a decision on their entitlement to class certification that would be persuasive under principles of comity. Under these circumstances, Rule 23 entitles the plaintiffs to proceed as a class if they can meet their burden of proving that the action satisfies the Rule's criteria for class certification.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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